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No. 96-1844

In The

Supreme Court of the United States

October Term, 1996

MMP INVESTMENTS, INC.,

Petitioner,

v.

LANDER CO., INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. May a party who started an arbitration and lost on counterclaims, challenge venue for its enforcement for the first time in this Court and thereby protract recovery by urging mandatory venue in the place of the award, given that permissive venue where the party resides better advances twin goals of arbitration as quick and cheap commercial dispute resolution?

2. Whether the Court of Appeals properly held that an arbitral award made in the United States, involving transactions abroad between U.S. companies, may be enforced in the United States under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), given that its implementing legislation, 9 U.S.C. § 201 *et seq.*, provides *inter alia* that transactions abroad between U.S. citizens fall under the New York Convention?

3. Whether a party, who agrees to binding arbitration, commences arbitration under the terms of the agreement and loses on counterclaims, has waived all jurisdictional objections to the other party's right to recover under the arbitral award?

PARTIES TO THE PROCEEDING

Petitioner MMP Investments, Inc., was the claimant before the International Chamber of Commerce Court of International Arbitration, was the respondent in the U.S. District Court for the Northern District of Illinois, and was the appellee in the U.S. Court of Appeals for the Seventh Circuit, the court whose judgment it now seeks to reverse.

Respondent Lander Co., Inc., was the respondent and counter-claimant before the International Chamber of Commerce Court of International Arbitration, was the petitioner in the U.S. District Court for the Northern District of Illinois, and was the appellant in the U.S. Court of Appeals for the Seventh Circuit.

Respondent Lander Co., Inc. is wholly owned by Claneil Enterprises, Inc., a Delaware corporation, which is privately owned.

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BRIEF IN OPPOSITION

Respondent Lander Co., Inc., respectfully prays that the Petition for Writ of Certiorari sought in this matter be denied.

OPINION BELOW

Petitioner MMP Investments, Inc., seeks review of the decision of the U.S. Court of Appeals for the Seventh Circuit of February 18, 1997. That court's opinion is reported, *see Lander Co., Inc. v. MMP Investments, Inc.*, 107 F.3d 476 (7th Cir. 1997), and is reprinted in Appendix 1-11 to the Petition for the Writ of Certiorari.

The Seventh Circuit's opinion addressed the following three issues:

(a) What is the proper scope of waiver in enforcing a binding arbitration award, where a party who started the arbitration and lost on counterclaims, attempted to challenge its enforcement as lacking subject matter jurisdiction?

(b) What is the proper interplay between Chapters 1 and 2 of Federal Arbitration Act ("FAA"), 9 U.S.C. 1 *et seq.* and 201 *et seq.* respectively, where a party who defended and won on counterclaims in arbitration sought to enforce it under both Chapters, by alleging jurisdiction under Chapter 1 as based on the parties' diversity and under Chapter 2 as based on federal question?

(c) What is the proper application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), where a party to a dispute involving transactions abroad between two

U.S. companies sought to enforce U.S.-made arbitral award in the United States under the New York Convention, given that its implementing legislation, 9 U.S.C. § 201 *et seq.*, provides *inter alia* that a commercial relationship between U.S. citizens which contemplates performance abroad or some reasonable relation with a foreign state falls under the New York Convention?

The Seventh Circuit held:

(a) A party's conduct, beginning with agreement to *binding* arbitration and subsequently followed by the party's invocation of arbitration pursuant to the agreement, means the party's agreement to be bound by the outcome. That is, to agree to binding arbitration is to agree that if your opponent wins the arbitration he can obtain judicial relief if you refuse to comply with the arbitrator's award, i.e., a waiver to dispute the jurisdictional right to judicial relief to enforce the award.

(b) Nothing in the New York Convention or its history, or in the U.S. implementing legislation or its history, suggests exclusivity of Chapter 2 of the FAA, which implements the New York Convention, over Chapter 1 of the FAA, which deals with typical arbitration. Such exclusivity is particularly perverse in this case involving two U.S. companies, whose dispute falls squarely within the scope of Chapter 1 of the FAA. There is no reason to assume that Congress did not intend to provide overlapping coverage between Chapters 1 and 2 of the FAA.

(c) Article I(1) of the New York Convention applies not only to arbitral awards made in a different country from the one in which enforcement is sought but also to non-domestic arbitral awards. In acceding to the New

York Convention, the United States made a declaration under Article I(3) authorizing it to apply the New York Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State. This means the United States will enforce pursuant to the New York Convention only arbitral awards made in nations which also adhere to the New York Convention. Chapter 2 of the Act, 9 U.S.C. § 201 *et seq.*, which implements the Convention, supports this reading by authorizing enforcement of arbitral awards in disputes wholly between U.S. citizens if, as here, the dispute arose out of a contract involving performance abroad. Accordingly, the New York Convention applies to suits in the United States to enforce arbitration awards made here.

In reaching its decision, the Seventh Circuit agreed with the only other appellate court to have addressed the latter issue. *Bergesen v. Joseph Miller Corp.*, 710 F.2d 928 (2d Cir. 1983). In applying the rules set forth above, the Seventh Circuit reversed the judgment of the district court with instructions to reinstate Lander Co., Inc.'s suit.

STATEMENT OF THE CASE

Lander Co., Inc. ("Lander") initiated this suit against MMP Investments, Inc. ("MMP") to enforce an arbitration award. The parties are American companies agreeing since 1991 to have MMP distribute in Poland shampoos and other products manufactured by Lander in the United States, or produced by MMP under Lander's quality control. Their agreements provided that all disputes

should be settled by binding arbitration in New York City pursuant to the arbitration rules of the International Chamber of Commerce.

The parties had a falling out in 1993. In early 1994, Lander notified MMP that it was terminating the distribution agreements, and MMP filed a request for arbitration with the International Court of Arbitration ("ICC Court"), an arm of the International Chamber of Commerce. Lander answered, counterclaimed and did not contest the jurisdiction of the ICC Court. According to the terms of the parties' agreements, the dispute proceeded to arbitration in New York City before Steven A. Hammond, Esq. of Hughes Hubbard & Reed, One Battery Park Plaza, New York, NY, as Sole Arbitrator designated by the ICC Court.

Arbitrator Hammond decided for Lander. After five days of evidentiary hearings, including testimony of eight witnesses, over one hundred exhibits, the hearing transcript exceeding 1,300 pages, and the parties' pre-hearing and post-hearing briefs and memoranda of fact and law, he awarded Lander over $500,000 USD plus interest in a meticulously detailed 38 page arbitral award. He found that Polish "sale[s] of counterfeit Lander shampoo by MMP constitute[d] a serious breach of contract," "MMP's counterfeiting constituted common law infringement and unfair competition. . . . As such Lander is entitled to the full measure of damages arising from the [MMP] counterfeiting activity."

The arbitration rules of the International Chamber of Commerce make arbitration awards final and deem the parties by submitting their dispute to arbitration "to have

waived their right to any form of appeal insofar as such waiver can validly be made." ICC Rules of Arbitration Art. 24(2).

When MMP refused to pay the award, Lander brought this suit to enforce it in the federal district court in Illinois, where MMP resides. Lander asserted jurisdiction under both Chapters 1 and 2 of FAA, and noted that the United States is a party to the New York Convention. More specifically, it claimed that district court "has jurisdiction under 9 U.S.C. Secs. 1, 9, 201, 202, 203 and 207, and under 28 U.S.C. sec. 1332" and that the amount in controversy (exclusive of interest and costs) exceeds $50,000.[1]

In response, MMP first moved to dismiss the suit on the ground the New York Convention and thus Chapter 2 of the FAA was inapplicable to the parties' arbitration. Then, MMP moved to vacate the award under Chapter 1. Chapter 1 of the FAA allows only three months for challenging an arbitration award subject to the Act, 9 U.S.C. Sec. 12, and MMP was concerned, as it explained to the

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[1] Lander requested relief under *both* Chapters 1 and 2 of Title 9 U.S.C. Under Chapter 1, it pleaded jurisdiction on the basis of diversity of citizenship as would be required in a typical contract enforcement cause of action. Allegations pertaining to 28 U.S.C. § 1332 and 9 U.S.C. §§ 1, 9 are directed to this. Under Chapter 2, Lander pleaded that its award arose under the Convention, namely 9 U.S.C. 201, 202, 203 and 207. Section 203 provides for original jurisdiction of the federal district courts for actions arising under the Convention. However, it does not eliminate either explicitly or by implication the Chapter 1 jurisdiction asserted by Lander. Lander's jurisdictional statement was styled to reflect this combined approach. Nothing in the Convention or the rules of pleading prohibits it.

district court, that although Lander takes the position now that the Arbitral Award is covered by the New York Convention, Chapter 2 of the FAA, other allegations in Lander's Petition to Confirm suggest that if it is unsuccessful under the Convention, it will seek to enforce the award under Chapter 1 of the FAA. Under Chapter 1, failure to move to vacate an arbitration award forfeits the right to oppose its enforcement if sought later by the other party. In contrast, Chapter 2 contains no provision for seeking to vacate an award, although it contemplates the possibility of the awards being set aside in a proceeding under local law, Art. V(1)(e), 21 U.S.T. at 2520, and recognizes defenses to the enforcement of an award.

MMP asked the district judge to defer ruling on its motion to vacate under Chapter 1 of the FAA until the judge decided whether the New York Convention was applicable. Lander vigorously opposed MMP's motion to dismiss and the contention that the New York Convention did not apply here. Without any other filings or oral argument, the district judge ruled on the motions. He held that the New York Convention did not apply, and went on to dismiss the suit for want of federal jurisdiction, without mention of Chapter 1 of the FAA. See 927 F.Supp. 1078 (N.D.Ill. 1996). The decision is reprinted in Appendix pages 13 to 21.

Lander appealed. The Seventh Circuit reversed the judgment of the district court with instructions to reinstate Lander's suit. Its opinion is reported, *see* 107 F.3d 476 (7th Cir. 1997), and is reprinted in Appendix pages 1 to 11.

ARGUMENT

I. THE COURT SHOULD NOT ENDORSE A BELATED CHALLENGE TO VENUE CONTRARY TO THE GOALS OF ARBITRATION AS QUICK AND CHEAP COMMERCIAL DISPUTE RESOLUTION

A. As MMP Failed to Seasonably Challenge Venue For Enforcement of Arbitration Award, This Court Should Deny the Petition for Writ of Certiorari

MMP has waived venue objections by failing to urge them below. MMP did not timely assert F.R.C.P. 12(b)(3), and hence waived venue under F.R.C.P. 12(g) & (h), *O'Brien v. R.J. O'Brien & Assoc., Inc.*, 998 F.2d 1394, 1400-1401 (7th Cir. 1993). The record is completely wanting of any challenge to venue in MMP's motions, briefs, and arguments until the subject challenge. Having failed in its other delay tactics, MMP now seeks to further delay enforcement of its bargained-for result by attacking venue. This cannot stand. It is well settled that venue like personal jurisdiction may be waived when a party fails to seasonably assert it. *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960) ("Of course, venue, like jurisdiction over the person, may be waived. A defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default.")

B. Enforcement of a New York Arbitration Award In Illinois Advances Twin Goals of Arbitration To Provide Quick and Cheap Resolution

When a party starts and actively prosecutes an arbitration it is bound by the results. Post-award renege

tactics, such as MMP's Petition for Writ of Certiorari challenging venue for the first time before this Court, are not tolerated by the law. They frustrate the goal of arbitration to provide a "quick and cheap" commercial dispute resolution, *Widell v. Wolf*, 43 F.3d 1150, 1151 (7th Cir. 1994), see *also Flexible Manufacturing Systems Pty, Ltd., v. Super Products Corp.*, 1996 WL 304858, *3 (7th Cir. 1996) (holding that it was for the arbitrator to decide who breached the agreement first and what damages to award as a consequence, and imposing sanctions for a frivolous challenge to an arbitral award); *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192, at 1203 (7th Cir.1987) ("The *promise of arbitration is spoiled if parties disappointed by its results can delay the conclusion of the proceeding by groundless litigation* in the district court followed by groundless appeal to this court; we have said repeatedly that we would *punish such tactics and we mean it.*") [emphasis added]

Chapter 1 of the Act, 9 U.S.C. § 1 *et seq.*, establishes a "federal policy favoring arbitration." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)). MMP voluntarily entered into an arbitration agreement with Lander, requested arbitration in New York and lost on counterclaims. Given the well-settled federal policy favoring arbitration as a quick and cheap mechanism for dispute resolution, MMP's latest delay tactic should not be entertained by this Court.

Simply put, Lander's award made in New York, is enforceable in Illinois, MMP's residence. A Federal court may hear this action under 28 U.S.C. § 1331, Title 9 federal question, and/or 28 U.S.C. § 1332, diversity of

citizenship and 9 U.S.C. § 9. MMP's latest delay tactic by way of the subject Petition has demonstrably wasted time and money; by the time this matter will be heard the award will likely reach its second anniversary.

The venue for bringing the confirmation of a New York award in Illinois is permissive under 9 U.S.C. § 9. *Merril Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 329 (7th Cir. 1995); *In re VMS Securities Litigation*, 21 F.3d 139, 144-45 (7th Cir. 1994); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2nd Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986); *Motion Picture Lab Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16, 18-19 (2nd Cir. 1986). *VMS* reaffirmed the leading case *NII Metals Services, Inc. v. ICM Steel Corp.*, 514 F.Supp. 164 (N.D. Ill. 1981), holding that a federal court which otherwise has jurisdiction over the parties may confirm an arbitral award made within a different district. *NII* involved an Illinois contract claim against ICM, who successfully invoked the arbitration clause contained in the parties' agreement. After NII prevailed at the arbitration hearings in New York, it moved for enforcement under § 9 in the Northern District of Illinois. ICM resisted on the grounds that § 9 limits jurisdiction for confirmation to the United States District Court for the Southern District of New York, where the arbitration was held. It lost, as should MMP's argument.

MMP's belated position stymies the purposes of the FAA. This Court has deemed the "statutory policy" of the Act to be "rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 23 (1983). Denying jurisdiction or restricting venue here without any mandate or reason to do so thwarts this policy. *See, VMS*, 21 F.3d at 145. As

fully established above, Lander is entitled to enforcement of its bargained-for award under 9 U.S.C. § 9. For these reasons, this Court should not hear MMP on its belated venue challenge.

II. AMERICAN-MADE ARBITRAL AWARDS MUST BE ENFORCED HERE UNDER THE NEW YORK CONVENTION AS THIS IS CLEARLY CONTEMPLATED BY THE PURPOSE OF THE CONVENTION, ITS IMPLEMENTING LEGISLATION, AND THE PRECEDENT

Article I(1) of the Convention mandates confirmation and enforcement of non-domestic arbitral awards. Chapter 2 of the FAA, 9 U.S.C. § 201 *et seq.*, implementing the Convention, defines "non-domestic" as an arbitral award arising out of a relationship which envisages a performance abroad between U.S. citizens and provides that such non-domestic awards fall under the Convention. To the extent the U.S. accession declaration under Article I(3) limits the enforcement of arbitral awards, it does so on the basis of reciprocity. That is, the accession declaration encourages recognition of the awards made within a Contracting State to the Convention. Accordingly, the award made in the United States, a Contracting State, based on the parties' transactions in Poland, clearly falls under the Convention.

A. History, Text, and Purpose of the Convention Mandate Interpretation of Non-Domestic Awards To Include Performance Abroad under 9 U.S.C. § 202

The Second Circuit explored the purpose and history of the Convention in *Bergesen v. Joseph Miller Corp.*, 710

F.2d 928 (2d Cir. 1983) (holding that an arbitral award obtained in New York involving two foreign entities falls under the Convention). *See also, Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 887 F.2d 1357, 1363 (9th Cir.1989), *cert. denied*, 494 U.S. 1016 (1990) (holding that the Iran-U.S.A. Claims Tribunal awards were enforceable under the Convention).

In New York in 1958, the United Nations facilitated the creation of an international agreement, the Convention or the New York Convention, providing for enforcement of foreign arbitral awards. Party-States to the Convention agreed to recognize arbitral awards as binding and enforce them in accordance with their own rules of procedure. *Id.* 887 F.2d at 1362 *citing* to Article III of the Convention. The Convention reflects the efforts of businesses involved in international trade to provide a workable mechanism for the swift resolution of their day-to-day disputes. International merchants often prefer arbitration over litigation because it is faster, less expensive, private and more flexible. *Bergesen*, 710 F.2d at 929.

The United States attended and participated in the 1958 conference, but did not sign the Convention. Ten years later, the Senate gave its consent, but accession was delayed until 1970 in order for Congress to enact the necessary implementing legislation. There was no opposition to the proposed legislation, H.R.Rep. No. 91-1181, 91st Cong., 2d Sess. 2, *reprinted* in 1970 U.S.Code Cong. & Ad.News 3601, 3602, which became 9 U.S.C. §§ 201-208 (1976). *Bergesen*, at 929. *See also, Gould*, 887 F.2d at 1362; *Cargill Intern. S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993) (reversing a dismissal for lack of

subject matter jurisdiction where petitioner made out a *prima facie* claim under the Convention).

Article I(1) of the Convention provides:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards *not considered as domestic* awards in the State where their recognition and enforcement are sought. [emphasis added]

In acceding to the Convention, the United States made a declaration under Article I(3) of the Convention, 9 U.S.C. § 201, *see also, Bergesen*, 710 F.2d at 932-933 (*citing* Presidential Proclamation 21 U.S.T. 2517, T.I.A.S. No. 6997 (1970)), reprinted at notes following 9 U.S.C. § 201:

> The United States will apply the Convention, *on the basis of reciprocity,* to the recognition and enforcement of only those awards made in the territory of *another* Contracting State. [emphasis added]

The implementing legislation Section 202 of Title 9 U.S.C., which is entitled "Agreement or award falling under the Convention," in turn provides:

> An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention *unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other*

> *reasonable relation with one or more foreign states.* [Emphasis added]

Focusing these rules on the subject case means the Convention applies to any arbitral award made within the territory of a Contracting State, including the United States, involving commercial transactions between U.S. citizens abroad.

B. Territorial Principle Embodied in Article I(3) Focuses on Reciprocity of Signatories Not On Awards Made in Different Contracting States

This Court as well as the Second, the Ninth, the Fifth, the Seventh, and the First Circuits focuses on the point which MMP has missed. The adoption of the declaration does not give rise to a narrow interpretation of the Convention.[2] *Bergesen*, 710 F.2d at 933. Rather, the Convention

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[2] To the extent there is an ambiguity, if any, the 1972 implementing legislation clarifies the 1970 accession declaration. It is well settled that a later enactment supersedes a prior Treaty. *Edye v. Robertson*, 112 U.S. 580, 599 (1885) ("so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal"); *Tag v. Rogers*, 267 F.2d 664, 667-668 (D.C.Cir. 1959) (Mr. Justice Burton, retired), *cert. denied*, 362 U.S. 904 (1960) (holding the treaties and statutes are on the same level and, thus the latest action expresses the controlling law):

> Once a policy has been declared in a treaty or statute, it is the *duty* of the federal courts to accept as law *the latest expression* of policy made by the constitutionally authorized policy-making authority . . . When, . . . a constitutional agency adopts a policy contrary to a

should be interpreted broadly to effectuate its purpose. *Bergesen*, 710 F.2d at 933; *Cargill*, 991 F.2d at 1018; both citing to *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 520 n. 15 (1974), *rehearing denied*, 419 U.S. 885 (1974), and other cases.

This Court has taught the intended purpose of the Convention is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts, *Scherk*, 417 U.S. at 520 n. 15 (an international commercial agreement to arbitrate a dispute under the ICC Court rules in Paris, France, should be respected and enforced by the U.S. courts despite alleged violations of U.S. securities laws):

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was *to encourage the recognition and enforcement of commercial arbitration agreements in international contracts* and to unify the standards by which agreements to arbitrate are observed and *arbitral awards are enforced in the signatory countries. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, S. Exec. Doc. E, 90th Cong., 2d Sess. (1968); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049 (1961). [emphasis added]

The Second Circuit applied that purpose in *Bergesen*, 710 F.2d at 933, and held that Congress spelled out the

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trend in international law or to a treaty or prior statute, the *courts must accept the latest act* of that agency. [emphasis added]

definition of what constitutes a non-domestic award under Article I(1) in the implementing legislation embodied in 9 U.S.C. § 202:

> The legislative history of this provision [9 U.S.C. § 202] indicates that it was intended to ensure that "an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in [United States] courts unless *it has a reasonable relation with a foreign state.*" H.R.Rep. No. 91-1181, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S.Code Cong. & Ad.News 3601, 3602. Inasmuch as it was apparently left to each state to define which awards were to be considered *nondomestic*, see *Pisar* at 18, *Congress spelled out its definition of that concept in section 202. Had Congress desired to exclude arbitral awards involving two foreign parties rendered within the United States from enforcement by our courts it could readily have done so. It did not.* See *Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F.Supp. 737, 741 (S.D.N.Y. 1979), *aff'd mem.*, 620 F.2d 286 (2d Cir. 1980); Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw.U.L.Rev. 1, 16 (1971) (Under implementing legislation Convention should apply when foreign contacts are substantial, i.e., "where a foreign person or corporation is a party to an agreement involving foreign performance, *or where the business deal has some other 'reasonable relation with one or more foreign states.'* "); *see also* McMahon at 740-43. [emphasis added]

The Ninth Circuit applied the same purpose in *Gould*, 887 F.2d at 1362. Construing the territorial provision of Article I(3), *Gould*, at 1362, held that jurisdictional requirements under the Convention are satisfied for an award issued in The Hague, Netherlands, because Netherlands is a Contracting state:

> The United States imposes an additional related condition on the award: it must be *"made in the territory of another Contracting State"*, 21 U.S.T. 2566, reprinted at notes following 9 U.S.C.A. Sec. 201. Because of the "shall apply" language of Article I, *we read these requirements into the jurisdictional* mandate of section 203.
>
> The Tribunal's award satisfies these requirements as well. That is, the Tribunal sits at The Hague, which is in the Netherlands, *which is a contracting State*. In addition, the award is obviously not domestic in nature because Iran is one of the parties to the agreement. [emphasis added]

The Fifth Circuit explained Congress' purpose in adopting the Article I(3) declaration in *National Iranian Oil Co. (NIOC) v. Ashland Oil, Inc.*, 817 F.2d 326 (5th Cir. 1987), *cert. denied*, 484 U.S. 943 (1987). Upholding an agreement between Iranian and U.S. companies to hold arbitration in Iran, *NIOC*, at 335, held that concerned with reciprocity, Congress' purpose in adopting the Article I(3) declaration was to allow signatory States to reap the benefits of the Convention, and thus to give further incentives to non-signatory States to join:

> When the United States adhered to the Convention, it expressly chose the option available in Article I(3), to "apply the Convention, on the

> basis of reciprocity, to the recognition and enforcement of *only* those awards made in the territory of another Contracting State." Declaration (emphasis added). While the House and Senate Committee reports do not inform us as to the purpose of adopting this reservation, *its purpose seems obvious*. Concerned with *reciprocity*, Congress must have meant only to allow *signatories to partake of the Convention's benefits* in U.S. courts and thus to give further *incentives* to non-signatory nations to adhere to the Convention. [emphasis added]

See also, E.A.S.T., Inc. of Stamford, Connecticut v. M/V Alaia, 876 F.2d 1168, 1172 (5th Cir. 1989) (holding an agreement involving a party from a non-signatory State falls under the Convention since the agreement provides that arbitration will occur within a signatory State):

> The principle of reciprocity is thus concerned with the forum in which the arbitration will occur and *whether that forum state is a signatory to the convention* – not whether both parties to the dispute are nationals of signatory states. *La Societe Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures v. Shaheen Natural Resources, Inc.*, 585 F.Supp 57, 64 (S.D.N.Y. 1983), *affirmed on basis of district court opinion*, 733 F.2d 260 (2d Cir. 1984), *cert. denied*, 469 U.S. 883 (1984). [emphasis added]

The First Circuit dealt with the scope of the Convention and the U.S. declaration under the Article I(3) in the context of jurisdictional analysis involving a request for arbitration. *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-187 (1st Cir. 1982), construed the Convention Articles I(1) and

I(3) to ask whether the agreement provides for arbitration "in the territory of a signatory of the Convention," affirmed a dismissal based on an agreement to arbitrate a dispute in Italy, a signatory of the Convention, and set out the following test:

> (1) Is there an agreement in writing to arbitrate the subject of the dispute? Convention, Articles II(1), II(2).
>
> (2) Does the agreement provide for arbitration *in the territory of a signatory of the Convention? Convention, Article I(1), I(3)*; 9 U.S.C. § 206; *Declaration of the United States upon accession*, . . . 9 U.S.C.A. at 154 n.29 (1982 Supp.)
>
> (3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial? Convention, Article I(3); 9 U.S.C. § 202.
>
> (4) Is a party to the agreement not an American citizen *or does the commercial relationship have some reasonable relation with one or more foreign states*? 9 U.S.C. § 202. [emphasis added, parallel citations omitted]

See also, Sedco v. Petroleos Mexicanos Mexican National Oil Co. (Pemex), 767 F.2d 1140, 1144-1145 (5th Cir. 1985); *Tennessee Imports, Inc. v. Filippi*, 745 F.Supp. 1314, 1321-1322 (M.D. Tenn. 1990); *Corcoran v. Ardra Insurance Co., Ltd.*, 657 F.Supp. 1223, 1227 (S.D.N.Y. 1987), appeal dismissed, 842 F.2d 31 (2nd Cir. 1988), all applying the *Ledee* test. See

also, *Fuller Co. v. Compagnie Des Bauxites De Guinee*, 421 F.Supp. 938 (W.D.Pa. 1976).[3]

The cited precedent magnifies the point missed by MMP. The avowed purpose of the Convention to encourage the recognition and enforcement of international commercial arbitration agreements is met by enforcing in the United States, the American-made arbitral award involving transactions in Poland between U.S. citizens. As the United States is a signatory to the Convention, the awards made in its territory, for its citizens, may not be excluded from the Convention. Any other result plainly contradicts the implementing legislation embodied in 9 U.S.C. § 202. *Cf., Scherk*, 417 U.S. at 520 n. 15: "Congress passed Chapter 2 of the United States Arbitration Act, 9 U.S.C. § 201 *et seq.*, in order to implement the Convention. Section 1 of the new chapter, 9 U.S.C. § 201, provides *unequivocally* that the Convention 'shall be enforced in United States courts in accordance with this chapter.' " [emphasis added]

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[3] A request to commence arbitration springs from the same well as the right to enforce the resulting arbitral award, *i.e.* the parties' agreement to arbitrate. An unconfirmed award is a contract right which may be used as the basis for a cause of action. A request to commence arbitration runs from the arbitration clause in a contract. An action to confirm an arbitral award after a losing party reneges (as here) runs from the identical arbitration clause in the contract. Moreover, a request for arbitration carries no force without enforcement. By definition, a contract is an enforceable promise, and thus there can be no valid contract without meaningful enforcement.

The interpretation of Section 202 as urged by MMP is impermissibly narrow. Manifestly, many global companies take advantage of arbitration to resolve international commercial disputes within the territory of the United States. To hold, as MMP asks here, that these companies must go elsewhere to enforce American-made awards is inefficient and limits the choices available for enforcement. Indeed, MMP's reasoning places the purpose of the Convention on the horns of a dilemma. Under one choice, Lander would have to confirm the award in Poland, or Canada, or France, or anywhere but the United States to fall under the Convention. Since MMP probably has no assets in any of these States, Lander would have to get a foreign judgment under the Convention, say in Poland (a signatory to the *Convention*) which would then have to be recognized in the U.S. courts through an additional mechanism for recognition of foreign judgments. This undoubtedly means further delay and additional costs: the very results which the Convention and its implementing Chapter 2 of the FAA work hard to avoid. Under another choice, Lander would have to specify a non-U.S. forum to conduct the arbitration so as to obtain the benefits of U.S. courts for enforcement of the award under the Convention. Manifestly, this option is especially unfair to U.S. citizens, since it forces them to arbitrate abroad to take advantage of home court during enforcement. Again, this spawns costly delays.

C. MMP May Not Have the New York Convention construed for U.S. Citizens as a Limitation Wrapped in a Restriction Inside a Qualification

MMP argues that because the award was made in New York it cannot be enforced in the United States, and that the Article I(3) declaration when read with Article I(1), is conclusive that the award here is not covered by the Convention. That is, while Article I(1) clearly provides that non-domestic awards fall under the Convention, MMP claims that Article I(3) excludes confirmation in the territory where the award was made. Thus, MMP asserts that as the implementing legislation in 9 U.S.C. 202 does not define "non-domestic" awards set forth in Article I(1), U.S. citizens are limited to confirming only foreign made awards under the Convention.

The meaning of the word "another" is ambiguous in Article I(3), as modifying the "Contracting State." MMP relies on this ambiguity and hangs its entire argument on the one interpretation of the word "another" which runs afoul of the purpose of the Convention as taught by this Court. The word "another"[4] could mean either "additional, similar" or "different." MMP imputes the latter

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[4] *See e.g. The Random House Dictionary of English Language* 85 (2d Ed. 1987), defining "another" as:

> 1. being one more or more of the same; further; additional: *another piece of cake.* 2. different; distinct; of a different period, place or kind: *at another time; another man.* 3. very similar to; of the same kind or category as: *What we need today is another Thomas Jefferson.* 4. one more; an additional one: *That first hot dog tasted so good I'd like another.* 5. a different one; something different: *going from one house to another.* 6. one like the first: one copy for her and another for

meaning to "another." It urges that in the subject case the Convention only applies to those awards made *outside* the United States. Such reading squarely contradicts the *principal purpose* underlying American adoption and implementation of the Convention. *See, Scherk,* 417 U.S. at 520 n. 15, *supra.*

MMP would have the Convention construed for U.S. citizens as a limitation wrapped in a restriction inside a qualification. This cannot stand. Obstructing the enforcement in the United States of American-made awards involving transactions abroad discourages the mandated recognition and enforcement of commercial arbitral agreements in international contracts.[5] That the restriction invites expense, delay, and inefficiency into the arbitration system is also at odds with the purpose. Informed by the clear purpose of the Convention, "another" in Article I(3) must mean "additional" or "similar", *not* "different." Indeed, MMP concedes this critical point because its Petition is silent on the issue of Convention's purpose. *PepsiCo, Inc. v. Redmond,* 54 F.3d 1262, 1271 (7th Cir. 1995)

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him. 7. a person other than oneself or the one specified: *He told her he loved another.* [emphasis in original]

See also, The Oxford English Dictionary (2d Ed. 1961); *Webster's Ninth New Collegiate Dictionary* (9th Ed. 1983).

[5] *Cf., Scherk,* at 516-517: "A parochial refusal by the courts of one country to *enforce* an international arbitration agreement would not only *frustrate* these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." [emphasis added] That MMP is jockeying after it lost the arbitration it started aggravates the situation.

("silence on the issue in its . . . brief indicates that it concedes the point").

MMP's disregard for the purpose of the statute clearly conflicts with this Court's instruction that where the language of the statute (or treaty) is ambiguous its purpose informs the meaning. *See, e.g., United States v. Bacto-Undisk*, 394 U.S. 784, 799 (1969) ("where the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose' ", *quoting SEC v. Ralston Purina Co.*, 346 U.S. 119, 124-125 (1953)). The context of the purpose and the Article I(3) language as to reciprocity, establish that "another" deals with reciprocity, *i.e.* the "additional" meaning of the word. That is, concerned with reciprocity, Congress' purpose in adopting the Article I(3) declaration was to allow signatory States to reap the benefits of the Convention, and thus to give further incentives to non-signatory States to join. *NIOC*, 817 F.2d 326. As the United States is a signatory, the New York arbitral award here falls under the Convention.

The Convention itself excludes MMP's reading. Thus, in the first sentence of Article I(1), the "territorial" restriction as to the awards as urged by MMP is expressed as "awards made in *the territory of a State other than the State where the recognition and enforcement of such awards are sought*. [emphasis added]." In contrast, Article I(3) uses "awards made only in the territory of *another* Contracting State. [emphasis added]." Manifestly, had the drafters of the Article I(3) meant to assign the meaning urged by MMP, they would have used the same language as that appearing in the first sentence of Article I. The fact they did not is a strong indication of the "additional" meaning which further defeats MMP's interpretation.

D. Informed by its Purpose, the Convention, Its Implementing Statute 9 U.S.C. § 202, and the Precedent, Are in Harmony

Article I(3) and the implementing legislation of 9 U.S.C. § 202 should be read together rather than one to the exclusion of the other. Article I(1) and the purpose of the Convention must also be considered in the calculus. And all of these provisions must be read together – without conflict, and as they have been interpreted by the courts. *See e.g., Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982). In this way, all material meanings agree and the words mean what they say. Article I(1) means non-domestic awards fall under the Convention. Article I(3) means The United States will recognize and enforce awards made in any Contracting State, including itself. The precedent, as illustrated by *Bergesen*, 710 F.2d at 933, *Ledee*, 684 F.2d at 186-187, *NIOC*, 817 F.2d at 335, and others cited *supra*, means the courts uphold agreements to arbitrate in international contexts, and recognize and enforce arbitral awards under the Convention on the basis of reciprocity. The purpose of the Convention is fulfilled, when *more* non-domestic awards are recognized and enforced rather than *less*. Such inclusive, consistent reading erases MMP's position.

Simply put, MMP's unwarranted restrictions of the New York Convention for U.S. citizens are trumped by the inclusive reading of its terms, its implementing legislation, and clear precedent. MMP may not avoid this bargained-for result by arguing that courts or Congress overrule international law. This diversion fails.

MMP similarly fails in its characterization of the clear precedent weighing against its position. By way of example, at page 17 of its Petition it attempts to spin the holding of *Gould*, 887 F.2d 1357, citing it for the proposition that Article I(3) must be read together with Article I(1). However, MMP omits the next paragraph in *Gould*, at 1362, which explains both the effect and the reasoning of this inclusive reading: jurisdictional requirements under the Convention are satisfied for an award issued in The Hague, Netherlands, *because* Netherlands is a Contracting state. Finally, MMP has no response to the teaching and holding in *Ledee*, 684 F.2d at 186-187, and the many cases which followed it.[6] Again, under *PepsiCo*, 54 F.3d at 1271, MMP's silence concedes that reciprocity controls the meaning of "another."

III. A PARTY, WHO AGREES TO BINDING ARBITRATION, THEN COMMENCES ARBITRATION UNDER THE TERMS OF THE AGREEMENT AND LOSES ON COUNTERCLAIMS HAS WAIVED ALL JURISDICTIONAL OBJECTIONS TO THE OTHER PARTY'S RIGHT TO JUDICIAL RELIEF TO ENFORCE THE ARBITRAL AWARD

MMP commenced this arbitration in accord with its agreements with Lander. The agreements provided that the arbitration would be *binding*.

By commencing the arbitration and contesting it fully to an arbitral award, MMP has waived all jurisdictional

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[6] Instead, it focuses on a proposed interpretation of what makes a New York award non-domestic by a Dutch lawyer (see Petition at 19).

objections to Lander's right to judicial relief to enforce the arbitral award.

This cannot be more eloquently expressed than was done by Chief Judge Posner in *Lander* at 107 F.3d 480:

> To agree to binding arbitration is to agree that if your opponent wins the arbitration he can obtain judicial relief if you refuse to comply with the arbitrator's award. Were there a rule that no one could be ordered by a court to pay an arbitration award unless he agreed to submit himself to the court's jurisdiction, the signing of the agreement to *binding* arbitration would be a waiver of the rule. To invoke arbitration pursuant to such an agreement, as MMP also did, is further to agree to be bound, if necessary through court action, by the arbitrator's award, provided, of course, that the award does not have any infirmity of a sort that a court can use to invalidate an arbitration award. Imagine MMP's indignation if it had won the arbitration and Lander had denied that any court in the United States had jurisdiction to enforce the award (Emphasis present)

CONCLUSION

For the foregoing reasons, this Court should deny MMP's Petition for Writ of Certiorari.

Respectfully submitted,

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